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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GI JEON MOON,

Defendant and Appellant.

G040437

(Super. Ct. No. 05NF4922)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Judge. Affirmed.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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We appointed counsel to represent defendant Gi Jeon Moon on appeal. Counsel filed a brief setting forth a statement of the case. Counsel did not argue against her client, but advised the court she found no issues to argue on his behalf. We provided defendant 30 days to file written argument. That period has passed, and we have received no communication from him.

We have examined the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. This is defendant's third appeal in the case. In his initial appeal, we affirmed Moon's conviction for assault with intent to commit rape (Pen. Code, § 220; all statutory references are to this code unless otherwise noted). (*People v. Moon* (Sept. 21, 2007, G037464) [nonpub. opn.]¹) A different judge subsequently found defendant violated the terms of his probation, and sentenced him to state prison for the aggravated six-year term. We agreed with defendant imposition of the upper term violated his Sixth Amendment right to a jury trial because the sentencing judge made his own factual findings to support the upper term. We reversed and remanded for resentencing. (*People v. Moon* (Feb. 27, 2008, G037729) [nonpub. opn.] (*Moon II*)); *Cunningham v. California* (2007) 549 U.S. 270.) We expressly directed the court to consider mitigating circumstances that initially influenced the court's decision to grant probation. (*Moon II*, *supra*, at p. 10, fn. 3; *People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163.)

The case was assigned to the trial judge. At the May 23, 2008, resentencing hearing, the prosecutor argued for an aggravated six-year term based on the reasons cited by the second judge, i.e., defendant engaged in cruel, violent conduct that reflected a serious danger to society, and the victim was particularly vulnerable because she had consumed alcohol and was asleep.

Defense counsel represented that his client did not seek another grant of probation but argued for the two-year low term. Counsel asserted the court was required

¹ We direct the reader to the prior opinions for a more complete factual and procedural recitation.

to consider facts influencing the court's initial decision to grant probation, including the absence of serious or residual injury, alcohol use by both parties induced the event, defendant had previously performed satisfactorily on probation in a misdemeanor driving under the influence case and defendant had no history of violence. Counsel contended there were no factors in aggravation, i.e., facts that made the assault with intent to commit rape distinctively worse than ordinary. The court imposed the midterm sentence of four years and awarded 933 days of custody credit.²

Counsel identifies only one potential issue for our review: whether imposition of the midterm sentence was lawful. Section 1170, subdivision (a)(3), provides in pertinent part: "In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. . . . [¶] (b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's

² In our second opinion, we remarked in a footnote "Judge Stanford implicitly rejected these factors [the aggravating factors cited by the second judge] when he granted probation. We are reluctant to say beyond a reasonable doubt the jury would have found these factors true when the veteran jurist who presided over the trial and observed the demeanor of the witnesses did not make these findings when given the opportunity to do so."

We noted in 2006, California Rules of Court, rule 4.433(b) provided, "If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge shall make factual findings as to circumstances which would justify imposition of the upper term or lower term if probation is later revoked, based upon the evidence admitted at trial."

California Rules of Court , rule 4.433(b) currently reads: "If the imposition of a sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must identify and state circumstances that would justify imposition of one of the three authorized prison terms referred to in section 1170(b) if probation is later revoked. The circumstances identified and stated by the judge must be based on evidence admitted at the trial or other circumstances properly considered under rule 4.420(b)."

report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. . . . [¶] (c) The court shall state the reasons for its sentence choice on the record at the time of sentencing."

California Rules of Court, rule 4.420(b) provides: "In exercising his or her discretion in selecting one of the three authorized prison terms . . . , the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." The rules provide "reasons for selecting one of the three authorized prison terms . . . be stated orally on the record" in simple language. (Cal. Rules of Court, rules 4.420(e) & 4.406(a).) As note above, the choice of the appropriate term "shall rest within the sound discretion of the court." (§ 1170, subd. (b).) The trial court's selection of the appropriate term is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Judicial discretion "'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] [D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*Ibid.*)

The record reflects the court considered evidence of mitigating factors, including defendant's lack of a significant prior record and his performance on probation. The record does not reflect the court violated the rule requiring "[t]he length of the sentence [to] be based on circumstances existing at the time probation was granted" or that it considered subsequent events in selecting the term. (Cal. Rules of Court, rule 4.435, (b)(1).)

Imposition of the midterm in this case does not raise an arguable issue and we have found no other arguable issues. The judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.